

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Metrocall, Inc.,)	
)	
Complainant,)	
)	
v.)	File No. EB-01-MD-008
)	
Concord Telephone Co.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2002

Released: February 8, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we grant in part and deny in part the formal complaint that Metrocall, Inc. (“Metrocall”) filed against Concord Telephone Co. (“Concord”) pursuant to section 208 of the Communications Act of 1934, as amended (the “Act” or “Communications Act”).¹ We conclude that Concord violates section 201(b) of the Act² by charging Metrocall recurring fees solely for the use of direct-inward-dial (“DID”) telephone numbers. We further conclude, however, that Concord may lawfully charge Metrocall for the DID trunks and trunk termination facilities it provides to Metrocall apart from the DID numbers themselves, to the extent that Concord uses the DID facilities in question to transport “transiting traffic” to Metrocall’s network. Because the parties have not identified the extent to which the DID facilities in question are used to transport transiting traffic, we cannot ascertain on this record whether Concord owes Metrocall any damages. Therefore, we bifurcate the proceeding into separate liability and damages phases, and release this order adjudicating liability issues only.³

¹ 47 U.S.C. § 208.

² 47 U.S.C. § 201(b).

³ See 47 C.F.R. § 1.722(c). See also *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Order on Reconsideration, 16 FCC Rcd 5681, 5692, ¶ 24 (2001) (“*Formal Complaints Reconsideration Order*”) (“[T]he Commission may, on its own motion, bifurcate the proceeding so that only liability and prospective relief issues are before the Commission initially, and damage issues come before the Commission only if the complainant prevails and later chooses to initiate a separate proceeding seeking damages.”).

II. BACKGROUND

2. Metrocall is a commercial mobile radio service (“CMRS”) paging provider serving customers in the Charlotte, North Carolina Metropolitan Statistical Area (“MSA”), among other places. Concord is a local exchange carrier (“LEC”) in North Carolina providing the telephone facilities necessary for Metrocall to interconnect with the public switched telephone network in Concord’s region, including the Charlotte, North Carolina MSA.⁴ Concord has been providing interconnection services to Metrocall and its predecessor A+ Network, Inc. (“A+”) since at least January 1998.⁵

3. The services that Concord provides to Metrocall include a “DID Service,” which consists of DID trunks and trunk terminations (“DID facilities”) and blocks of DID telephone numbers.⁶ DID service allows a customer, typically a business with multiple telephone numbers, to receive calls directed to blocks of twenty numbers over a group of dedicated trunks, which reduces the facilities needed to carry traffic from the LEC to that customer.⁷ DID numbers are the blocks or groups of telephone numbers assigned by the LEC to the customer, and DID trunks and trunk terminations are the physical facilities that transport the traffic from the LEC to the customer.⁸ Concord charges its DID service customers for both “Block[s] of 20 DID Numbers” and DID trunks and trunk terminations.⁹

4. In early 1998, Metrocall requested that Concord cease charging it for DID numbers and DID facilities, claiming that the Commission’s rules and orders prohibited Concord from assessing such charges.¹⁰ Concord responded that its DID charges were lawful because (1) the DID

⁴ See Revised Joint Statement, File No. EB-01-MD-008, at 2–3 (filed May 29, 2001) (“*Joint Statement*”); Metrocall, Inc., Complaint, File No. EB-01-MD-008, at 2 (filed Apr. 6, 2001) (“*Metrocall Complaint*”); Answer of Concord Tel. Co., File No. EB-01-008, at 3–4 (filed May 18, 2001) (“*Concord Answer*”).

⁵ See *Metrocall Complaint* at 13; *Concord Answer* at 3–4.

⁶ See *Metrocall Complaint* at 13–14; *Concord Answer* at 4.

⁷ See *Concord Answer* at 4. As Concord explains, DID service benefits a customer by allowing calls to hundreds of DID numbers to be translated and routed over a minimal group of DID trunks to the customer’s premises. *Id.*

⁸ See *Concord Answer*, App. A at ¶ A-14.1 (containing relevant portions of the tariff that Concord filed with the North Carolina Utilities Commission (“NCUC”) governing Concord’s DID service).

⁹ See *Metrocall Complaint* at 13; *Concord Answer*, App. A at ¶¶ A-14.1 to A-14.2. Concord also provides long distance service, inside wire maintenance, and foreign exchange (“FX”) services to Metrocall. *Concord Answer* at 3–4. FX service enables a customer located in one particular local exchange area to make and receive local calls through a central office that is outside the customer’s local exchange area. *Id.* at 5. Metrocall has not challenged Concord’s charges for any of these services in this proceeding. See *Metrocall Complaint* at 24–25 and Exhibit 10 (calculating damages based solely on DID-related charges and excluding charges for long distance service, FX services, and other non-DID services).

¹⁰ See *Metrocall Complaint* at Exhibit Ten (citing Letter from Frederick Joyce & Ronald Quirk, Joyce & Jacobs, LLP, to Alan Goodman, Concord Tel. Co., Feb. 13, 1998; Letter from Frederick Joyce & Ronald Quirk, Alston & Bird, LLP, to Bill Terry, Concord Tel. Co., Feb. 28, 2000; Letter from Frederick Joyce & Ronald Quirk, Alston & Bird, LLP, to David Sieradzki, Hogan & Hartson, LLP, Apr. 12, 2000; Letter from Frederick Joyce & Ronald Quirk, Alston & Bird, LLP, to David Sieradzki, Hogan & Hartson, LLP, Apr. 24, 2000). Metrocall relied upon the Commission’s *Local Competition Order* to support its assertion that Concord’s DID charges were prohibited. *Implementation of the Local*

charges were not for the numbers themselves but for the “DID functionality in Concord’s switch”;¹¹ and (2) its North Carolina state tariff, not the Commission’s rules, governed the legality of DID-related charges.¹² On May 18, 2000, Concord filed a complaint with the NCUC addressing the legality of the DID-related charges that Metrocall was refusing to pay.¹³ Shortly thereafter, this Commission released the *TSR Wireless Order*, in which it resolved numerous issues relating to the propriety of LEC charges to CMRS carriers.¹⁴ After the *TSR Wireless Order*, the NCUC dismissed Concord’s complaint.¹⁵ Independent of the NCUC proceeding, Metrocall filed an informal complaint with the Commission against Concord in August 2000 pursuant to section 1.716 of the Commission’s rules.¹⁶ On April 6, 2001, Metrocall “converted” its informal complaint into the instant formal complaint pursuant to section 1.718 of the Commission’s rules.¹⁷

5. Metrocall’s complaint asserts two claims: (1) that Concord violates section 201(b) of the Act¹⁸ and Commission orders by charging recurring fees to Metrocall solely for the use of DID numbers;¹⁹ and (2) that Concord violates section 201(b) of the Act and section 51.703(b) of the

Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Memorandum Opinion and Order, 11 FCC Rcd 15499, 16016 at ¶ 1042 (1996) (“*Local Competition Order*”) (subsequent history omitted).

¹¹ See *Metrocall Complaint* at 13–14; *Concord Answer* at 4–5.

¹² See *Metrocall Complaint* at 13–14 and Exhibit Ten (citing Letter from David Sieradzki & Ronnie London, Hogan & Hartson, LLP, to Frederick Joyce & Ronald Quirk, Alston & Bird, LLP, Mar. 24, 2000; Letter from David Sieradzki & Ronnie London, Hogan & Hartson, LLP, to Frederick Joyce & Ronald Quirk, Alston & Bird, LLP, Apr. 26, 2000).

¹³ See *Metrocall Complaint* at 14–15; *Concord Answer* at 9–10.

¹⁴ *TSR Wireless, LLC v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166 (2000) (“*TSR Wireless Order*”), *aff’d sub. nom.*, *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

¹⁵ The NCUC held the proceeding in abeyance pending the outcome of the appeal of the Commission’s *TSR Wireless Order*. See *Concord Tel. Co. v. Metrocall, Inc.*, Docket No. P-921, Sub 1, Order Holding Docket in Abeyance, NCUC (rel. Aug 8, 2000). The D.C. Circuit upheld the *TSR Wireless Order*, and neither party requested that the proceeding resume; therefore, the NCUC dismissed Metrocall’s complaint on July 3, 2001, after the pleading cycle closed in this proceeding. See *Concord Tel. Co. v. Metrocall, Inc.*, Docket No. P-921, Sub 1, Order Closing Docket, NCUC (rel. July 3, 2001).

¹⁶ 47 C.F.R. § 1.716. See *Metrocall Complaint* at Exhibit Ten (Informal Complaint submitted by Frederick Joyce & Ronald Quirk, Alston & Bird, LLP, to Raelynn Tibayan Remy, File No. EB-00-MDIC-0055 (filed Aug. 23, 2000)). The informal complaint proceeding was closed on February 27, 2001. See Letter from Faye Jeter-Bragg, FCC Enforcement Bureau, to Frederick Joyce, Alston & Bird, LLP, File No. EB-00-MDIC-0055 (rel. Feb. 27, 2001).

¹⁷ 47 C.F.R. § 1.718. Although Metrocall filed the original complaint against three defendants, two of them settled early in the proceeding and their names were removed from the caption. See Letter Ruling, File No. EB-01-MD-008 (rel. May 15, 2001) (dismissing Coastal Communications, Inc.); Letter Ruling, File No. EB-01-MD-008 (rel. May 17, 2001) (dismissing ACS of Fairbanks, Inc.).

¹⁸ 47 U.S.C. § 201(b) (declaring unlawful “charges, practices, classifications, and regulations” that are unjust and unreasonable).

¹⁹ See *Metrocall Complaint* at 18–19.

Commission's rules²⁰ by charging Metrocall for DID facilities used to transport traffic from Concord's network to Metrocall's network.²¹ For the reasons discussed below, we grant Metrocall's complaint as to the first claim, and grant in part and deny in part Metrocall's complaint as to the second claim.

III. DISCUSSION

A. The Commission Has Jurisdiction to Adjudicate Metrocall's Complaint.

6. Concord argues that the Commission does not have jurisdiction to resolve this dispute because it concerns the application of terms set forth in a state tariff pre-dating the Telecommunications Act of 1996 ("1996 Act").²² According to Concord, the requirements of the *Local Competition Order* and section 51.703(b) of the Commission's rules dealing with interconnection charges between LECs and CMRS providers apply only to interconnection agreements entered into pursuant to sections 251 and 252 of the 1996 Act.²³ Concord asserts that no such agreement exists here and, therefore, its pre-existing state tariff governs the rights and obligations of Metrocall and Concord in this case.²⁴ Consequently, Concord argues that any disputes concerning these tariff obligations should be resolved by the NCUC, not by this Commission.²⁵

7. The Commission considered and rejected this same argument in the *TSR Wireless Order*. In that Order, the Commission concluded that the requirements set forth in the *Local Competition Order* and section 51.703(b) of the Commission's rules were effective immediately;²⁶ thus, "any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic" prohibited by the *Local Competition Order* and section 51.703(b) "would be unjust and unreasonable and violate the Commission's rules, regardless of whether the charges were contained in a federal or state tariff."²⁷ Accordingly, for the same reasons as stated in the *TSR Wireless Order*,

²⁰ 47 C.F.R. § 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.").

²¹ See *Metrocall Complaint* at 19–20.

²² See *Concord Answer* at 11–14, 18–20 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Communications Act of 1934)). Concord also contended that, because this matter was already before the NCUC, the Commission should dismiss the instant complaint and allow the state proceeding to continue to its conclusion. *Concord Answer* at 11–14. Concord's argument has since been mooted by the NCUC's dismissal of the proceeding, as discussed above. See *supra*, note 15.

²³ See *Concord Answer* at 11–14, 18–20.

²⁴ *Id.*

²⁵ *Id.* at 13–14, 18–19.

²⁶ See *TSR Wireless Order*, 15 FCC Rcd at 11168, ¶ 3.

²⁷ *Id.* at 11183, ¶ 29.

we conclude that we have jurisdiction to resolve Metrocall's complaint, notwithstanding the fact that the disputed charges were contained in a pre-1996 Act state tariff.²⁸

B. Concord May Not Charge Metrocall for DID Numbers.

8. Metrocall asserts that Concord violates section 201(b) of the Act and the Commission's orders by charging Metrocall recurring fees for DID numbers.²⁹ The Commission squarely addressed and resolved this issue in favor of the CMRS carriers in the *TSR Wireless Order*. Relying on long-standing Commission precedent, the Commission ruled that LECs could not impose on CMRS carriers (including Metrocall) recurring charges for the use of DID numbers.³⁰

9. Concord does not take issue with this precedent. Concord simply argues, instead, that the disputed charges are not solely for the use of numbers but are for the functionality in Concord's switch.³¹ Concord asserts that its "tariffed DID charges recover the costs of the local transport and switching functionality used to receive and terminate calls . . ."; according to Concord, "[t]hey do not constitute charges for the use or assignment of the telephone numbers."³² Concord cites no language from its tariff to support this contention, however. In fact, Concord's tariff unambiguously specifies rates for "Block[s] of 20 DID Numbers."³³ Further, Concord's invoices to Metrocall contain itemized charges for "Block[s] of 20 DID #s."³⁴ Accordingly, we conclude that Concord has imposed recurring charges on Metrocall solely for the use of numbers, in violation of section 201(b) of the Act. Thus, we grant Metrocall's complaint to the extent that it claims that Concord imposes recurring charges for the use of DID numbers. The extent to which Concord may

²⁸ *Id.*; see also *Local Competition Order*, 11 FCC Rcd at 16016–17, ¶¶ 1041–43. Concord also contends, without support, that the Commission lacks jurisdiction to decide this dispute because it concerns intrastate communications. See *Concord Answer* at 14. Concord cites no evidence that the communications traffic between it and Metrocall is purely intrastate. Moreover, the Commission concluded in the *TSR Wireless Order* that sections 2(b) and 332(c) of the Act, 47 U.S.C. §§ 152(b), 332(c), granted the Commission authority to issue rules governing interconnection between LECs and CMRS carriers. See *TSR Wireless Order*, 15 FCC Rcd at 11168, ¶ 3, 11173, ¶ 14; see also *Qwest*, 252 F.3d at 465–66.

²⁹ See *Metrocall Complaint* at 18–19.

³⁰ See *TSR Wireless Order*, 15 FCC Rcd at 11185–86, ¶ 33. Since 1986, the Commission has prohibited LECs from imposing recurring charges for the use of telephone numbers. The Commission reasoned that "telephone companies may not impose recurring charges solely for the use of numbers" because "they do not 'own' codes or numbers, but rather administer their distribution." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 R.R.2d 1275, 1284 (1986). See also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19538, ¶ 333 (1996) (subsequent history omitted) (noting that the Commission had "already stated that telephone companies may not impose recurring charges solely for the use of numbers.").

³¹ See *Concord Answer* at 4, 23.

³² *Id.* at 4.

³³ See *id.* at App. A at ¶¶ A-14.1 to A-14.2

³⁴ *Metrocall Complaint* at Exhibit 10. See also *Concord Answer* at Exhibit C (declaration of Pamela J. Genung that summarizes Concord's billing detail for Metrocall's account in which recurring charges for "Block[s] of 20 Direct Inward Dialing Numbers" are plainly listed).

owe Metrocall damages for this unlawful conduct may be determined in a subsequent proceeding under section 1.722 of the Commission's rules.³⁵

C. Concord May Charge Metrocall for DID Facilities to the Extent That They Are Used to Transport Transiting Traffic.

10. Metrocall also claims that Concord violates section 201(b) of the Act and section 51.703(b) of the Commission's rules by charging Metrocall for DID facilities.³⁶ We agree with Metrocall, in part. The Commission's rules state that a CMRS provider is not required to pay an interconnecting LEC for traffic that terminates on the CMRS provider's network, if the traffic originated on the LEC's network.³⁷ Furthermore, as the Commission concluded in the *TSR Wireless Order*, there is no difference between charges for the facilities used to transport this type of traffic and charges for the traffic itself – both kinds of charges are prohibited.³⁸

11. The Commission also concluded in the *TSR Wireless Order*, however, that paging carriers are “required to pay for ‘transiting traffic,’ that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network.”³⁹ The Commission subsequently confirmed this obligation in the *Texcom Order*.⁴⁰ There, the Commission stated that an interconnecting LEC may charge a paging carrier for the portion of the facilities used to carry traffic from the interconnecting LEC's network to the paging carrier's network, if the traffic did not originate on the LEC's network.⁴¹

12. Here, Concord charges Metrocall for DID facilities used to transport traffic from Concord's network to Metrocall's network.⁴² This traffic appears to include both calls originated by Concord's customers as well as calls originated by customers of carriers other than Concord, *i.e.*, transiting traffic.⁴³ To the extent that Concord charges Metrocall for the portions of the DID facilities that are used to transport traffic originating on Concord's network, Concord violates section 201(b) of the Act and section 51.703(b) of the Commission's rules. However, Concord may

³⁵ 47 C.F.R. § 1.722.

³⁶ *Metrocall Complaint* at 19–20.

³⁷ See 47 C.F.R. § 51.703(b) (“A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.”).

³⁸ See *TSR Wireless Order*, 15 FCC Rcd at 11181, ¶ 25.

³⁹ *Id.* at 11177, ¶ 19 n.70; see also 47 C.F.R. §§ 51.703(b), 51.709(b).

⁴⁰ *Texcom, Inc, d/b/a Answer Indiana v. Bell Atlantic Corp. d/b/a Verizon Communications*, Memorandum Opinion and Order, FCC No. 01-347 (rel. Nov. 29, 2001) (“*Texcom Order*”), petition for reconsideration pending.

⁴¹ See *Texcom Order* at 2–3, ¶¶ 4–6. The paging carrier may then seek reimbursement of the costs associated with transport and termination of that traffic from the carriers that originated the transiting traffic in question. See 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701, *et seq.*

⁴² *Joint Statement* at 2–3.

⁴³ Concord notes that Metrocall is a nation-wide paging provider and that callers from outside the Concord service area may send pages to Metrocall customers within the Concord area. *Concord Answer* at 6–7.

lawfully charge for the portions of the DID facilities that are used to transport traffic that merely transits Concord's network. Thus, we grant Metrocall's complaint to the extent that Concord charges Metrocall for the portions of DID facilities that are used to transport calls originated by Concord's customers, but deny Metrocall's complaint to the extent that Concord charges Metrocall for the portions of the DID facilities that are used to transport transiting traffic.

13. The parties have presented no information regarding the extent to which Concord charged Metrocall for non-transiting traffic. Accordingly, we cannot decide in this Order the extent to which Concord may owe Metrocall damages. Therefore, we bifurcate this proceeding, and Metrocall may assert a claim for damages in a subsequent proceeding brought under section 1.722 of the Commission's rules.⁴⁴

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 332, section 51.703 of the Commission's rules, 47 C.F.R. § 51.703, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the above-referenced complaint filed by Metrocall IS GRANTED IN PART to the extent specified herein, and in all other respects is DENIED, as of the Release Date of this Order.

15. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, section 1.722 of the Commission's rules, 47 C.F.R. § 1.722, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that this proceeding is bifurcated and Metrocall may assert a claim for damages in a subsequent proceeding brought under section 1.722 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁴⁴ See 47 C.F.R. § 1.722(c); see also *Formal Complaints Reconsideration Order*, 16 FCC Rcd at 5692, ¶ 24. Thus, we do not consider in this Order the damages issues Metrocall raises in its complaint. See *Metrocall Complaint* at 24–26.